SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 257

OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY TO APPELLEES' MOTIONS TO DISMISS APPEAL

MORRIS L. WEISBERG,
4 Penn Center Plaza,
Philadelphia, Pennsylvania 19103,

CLIVE S. CUMMIS,
23 Fulton Street,
Newark, New Jersey 07102,

Attorneys for Appellant, Oxford Consumer Discount Company of North Philadelphia.

July, 1970

Of Counsel:

BLANK, BOME, KLAUS & COMISKY,
Philadelphia, Pennsylvania.

CUMMIS, KENT, RADIN & TISCHMAN,
A Professional Corporation,
Newark, New Jersey.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1689

OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY TO APPELLEES' MOTIONS TO DISMISS APPEAL

The motions to dismiss filed by Appellees are based upon two contentions: (1) The judgment appealed from lacks finality within the meaning of 28 U. S. C. §1257, and (2) the appeal does not present substantial federal questions.

1. Finality

Appellees seize upon the remand for trial on certain factual issues as a main ground for their motions to dis-

miss this appeal. But the pleas for factual clarification ignore the critical question: whether there are fundamental federal questions separable from factual matters which present important issues and which in justice to the litigants should be decided without delay; not whether it would be easier or more convenient for this Court to decide the case if review were had after a trial had been concluded and appealed.

The modern cases demonstrate that parties will not be required to have their constitutional rights suspended while they are litigating their way through a maze of lower courts, see *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, 558, and *Construction Laborers* v. *Curry*, 371 U. S. 542, 549-51,[1] unless there is an identity of constitutional criteria between fact and law. Such an identity existed, for example, in *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 575 and *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 547, cited by Appellees. In *Rescue Army* the constitutionality of certain sections of the Los Angeles municipal code could not reasonably be determined in advance of proof as to the conduct of the defendant; in *Gospel Army* this Court declared that it could not assume that the California Supreme Court would find the ordinance constitutional under all factual circumstances.

It is obvious, however, that the New Jersey Supreme Court has found the Secondary Mortgage Loan Act of 1965 constitutional under all circumstances (except with regard to its *retroactive application*, where the separate factual determinations to be made in each case do not in-

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[1] See also, dissent of Mr. Justice Black in the denial of petition for writ of certiorari, *Rederi A/B Disa* v. *Cunard Steamship Co., Ltd.*, 389 U. S. 852.

volve issues of constitutional dimension). Appellees would have Oxford, First Mercantile Consumer Discount Company (Appellant in companion case No. 1688) and all other Pennsylvania loan companies in similar situations cease doing secondary mortgage loan business in Pennsylvania with New Jersey residents while various cases in the New Jersey state courts are pleaded, listed for trial, adjourned, delayed for discovery proceedings and motions, tried, appealed to the New Jersey Appellate Division, to the New Jersey Supreme Court, and again to this Court.[2]

The specific constitutional questions at issue here are whether the full faith and credit, interstate commerce and due process clauses preclude enforcement of the Secondary Mortgage Loan Act of 1965 against out of state lenders, both as to past and future transactions. At the present time the law of the case is that those constitutional provisions do not prohibit New Jersey control over out-of-state secondary mortgage loans involving New Jersey residents. *The same questions and the same answers will remain as to all future conduct of non-New Jersey lenders whether Oxford "wins" or "loses" on the issue of intermediation in a New Jersey trial court, and indeed without reference to the result of any trial or the facts developed there.* As to past transactions, a determination by this Court that the New Jersey Act cannot constitutionally be applied to out-of-state loans would obviate numerous state court cases.

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[2] Such appeals are almost certain regardless of which party prevails, because no clear lines have been drawn defining "intermediation"; and it is likely that such lines will not clearly be drawn until three, four or more cases have been tried and appealed, since each decision will do no more than state whether some particular conduct (if any) in a single transaction did or did not constitute "intermediation".

The criteria for determining whether a state court judgment is "final" for purposes of §1257(2) as set forth in the *Langdeau* and *Curry* cases were summarized in *Rosenblatt* v. *American Cyanamid Company*, 86 S. Ct. 1, 15 L. ed. 2d 39 (Goldberg, J., in Chambers), as follows:

(1) A final assertion of jurisdiction, with no further review of that issue possible in the state courts;

(2) A threat of serious erosion of national policy; and

(3) A state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case.

Analysis of the present case shows that all three criteria are met.

(1) Appellees do not dispute that the judgment of the Supreme Court of New Jersey constitutes "a final assertion of jurisdiction, with no further review of that issue possible in the state courts."

(2) As Mr. Justice Goldberg stated in the *Rosenblatt* opinion, the denial of an individual's constitutional rights by excessive assertion of state power does constitute a "threat of serious erosion of national policy" within the meaning of *Langdeau* and *Curry*.

(3) The fact that prospective application of the New Jersey Act has been held absolute and will thus remain unaffected by any factual determination on remand demonstrates that the issues in question are "anterior to and separable from the merits, and not enmeshed in the factual controversies of the case."

We ask the Court to note probable jurisdiction and "finally determine" claims of right separable from, and collateral to, rights asserted in the action, too important

to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546.

2. Substantiality of the Federal Questions Presented

(A) Appellees' reliance upon this Court's dismissal of appeal for want of a substantial federal question in *Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1, is misplaced. The facts were different. The issue was different. Two of our constitutional questions were not involved.

Fairfax Family Fund, Inc. was a Kentucky corporation engaged in the business of making small loans by mail to residents of many states, including California. The loan business was solicited through the mails; the prospective borrower would execute and return by mail a loan application and promissory note. If the loan were approved (a credit check having been made by a California independent agent) Fairfax would mail a check to the borrower, and monthly payments would be returned to the lender at its offices in Kentucky. Fairfax had no offices in California, nor did any of its corporate officers reside there. The attorney general of California brought an action to *enjoin Fairfax from conducting this business there until it obtained a license to do so* pursuant to the California Financial Code. The California courts ultimately held that Fairfax would be required to obtain a license from the State.

The issue in *Fairfax* was thus distinct from the questions presented in our case. Chief Justice Weintraub and the other dissenters from the New Jersey Supreme Court's opinion were not the only judges who perceived

this difference.[3] The California court expressly acknowledged the difference in distinguishing *Fairfax* from *International Textbook Company* v. *Pigg*, 271 U. S. 91, when it stated that *Pigg* "was a case involving the *foreign corporation's right to sue in the state court, which is not the issue before this court.*" (Emphasis added.) *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 886, 47 Cal. Rptr. 812, 815.

In *Fairfax* it was the "contacts" which the Kentucky corporation had with California which led the state court to hold that the foreign lender was required to obtain a license before it could do business there. An analysis of the various relevant contacts in *Fairfax* and in the present case reveals the following:

	Fairfax	*Oxford*
1. Borrower a resident of forum state	Yes	Yes
2. Lender goes to forum state, rather than borrower leaving forum state	Yes	No
3. Loan negotiated in forum state	Yes	No
4. Promissory note signed in forum state	Yes	No
5. Money received in forum state	Yes	No

With different operative facts and a different issue at stake the constitutional arguments in *Fairfax* involved solely the commerce clause, and then only as it applied to the licensing question. Neither the full faith and credit nor the due process clauses was involved at all.

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[3] See Oxford's Appendix, p. 6a, footnote 1. "This case is unlike [*Fairfax*] with respect to both the facts and the issues involved. * * * [T]he question was not whether the loans should be forfeited but whether the lender should be restrained from continuing the business until a license was obtained."

(B) Oxford's assertion in its Jurisdictional Statement that the mandate of the full faith and credit clause cannot be ignored here (notwithstanding appellees' arguments regarding the exception for enactments "obnoxious to the public policy" of the forum state) is reinforced by an examination of the pending New Jersey legislation to which its Attorney General adverts in his motion to dismiss (pp. 23-24).

First, it should be noted that in the Statement annexed to the original Senate bill[4] it is admitted that the Secondary Mortgage Loan Act of 1965 permitted effective interest rates far in excess of those allowed in Pennsylvania:

> "The allowance of specified fees and charges provided a method whereby licensees were able to circumvent the policy and spirit of the legislation, since the combination of fees and charges plus interest amounted to an effective interest rate charge far in excess of that contemplated by the Legislature. On loans under $1,000.00, the fees and charges combined with the interest allowed may be equivalent to *an effective interest rate in excess of 50%*. In general, calculation of fees, charges and interest on loans of $2,000.00 or less establish that the total sum thereof paid by many borrowers is equivalent to *an effective interest rate of 20 to*

[4] New Jersey Senate Bill No. 289 (set forth in Appendix A to the New Jersey Attorney General's motion to dismiss and brief, pp. 1a-27a), is a remake of Senate Bill No. 506, introduced February 11, 1969. Both Senate bills concluded with the Statement referred to above, the full text of which is set forth in the Supplemental Appendix at the conclusion of this brief. The Statement was omitted from the text of the bill in the "official copy reprint" reproduced in the New Jersey Attorney General's Appendix A.

50%, depending upon the amount and term of the loan." (Emphasis added.)

The thrust of the figures presented in footnote 15, pp. 24-26 of our Jurisdictional Statement—that enforcement of the Pennsylvania Act could hardly be deemed violative of New Jersey public policy when the borrower pays more for his loan under the New Jersey Act than he does under the Pennsylvania Act—is thus admitted by the legislature in its attempted revamping of the New Jersey Act.

Second, the immediate increase in allowable interest rate to 15% with further provision for increase to as much as 18% provided in Senate Bill No. 289 clearly reflects legislative recognition of the validity of the arguments made by Oxford in the New Jersey courts—that addition of heavy fixed charges to an ostensibly lower interest rate was more devastating to the borrower than the combination of interest rate and charges provided for under the Pennsylvania Act. It was the difference in flat interest rates upon which Judge Conford so heavily relied in determining for the Appellate Division that the public policies of the two states varied sufficiently to make refusal to enforce Pennsylvania obligations in New Jersey constitutionally permissible. Even the Attorney General of New Jersey concedes that enactment of Senate Bill No. 289 would effectively eliminate all but the most technical differences between the Pennsylvania and New Jersey Acts. In sum, intellectual honesty demands cognizance of the fact that whether or not the proposed legislation is enacted the public policies of Pennsylvania and New Jersey do not differ substantially, and certainly not to the extent where one could be deemed "obnoxious" to the other. This Court has held that such differences in comparable statutes cannot be utilized to overcome

the constitutional requirements of the full faith and credit clause. *Bradford Electric Co., Inc.* v. *Clapper*, 286 U. S. 145, 161-62.

CONCLUSION

For the reasons stated above and in our Jurisdictional Statement, we respectfully urge that Appellees' motions to dismiss be denied and that probable jurisdiction be noted.

Respectfully submitted,

MORRIS L. WEISBERG
4 Penn Center Plaza
Philadelphia, Pennsylvania 19103

CLIVE S. CUMMIS
23 Fulton Street
Newark, New Jersey 07102
Attorneys for Appellant Oxford Consumer Discount Company of North Philadelphia

July, 1970

BLANK, ROME, KLAUS & COMISKY
Philadelphia, Pennsylvania

CUMMIS, KENT, RADIN & TISCHMAN
A Professional Corporation
Newark, New Jersey

[SUPPLEMENTAL APPENDIX FOLLOWS]

SUPPLEMENTAL APPENDIX

Senate Bill No. 289

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1970 SESSION

By Senators TANZMAN, BATEMAN and McDERMOTT

* * *

STATEMENT

This bill embodies a total revision of the Secondary Mortgage Loan Act of 1965. Any differences in specific statutory language between this revision and the predecessor Act are not indicative of a legislative intent as to the construction and interpretation of the Act of 1965. The changes made, instead, represent an accommodation to the total revision of the law. Therefore, the changes embodied herein should not affect any existing court proceedings concerning the interpretation and construction of the Secondary Mortgage Loan Act of 1965, or any such proceedings which may be subsequently filed based on that Act.

This revision incorporates provisions which were found necessary as a result of the investigations and hearings conducted by the Department of Banking and Insurance and the Office of the Attorney General, wherein certain secondary mortgage loan licensees were called upon to show cause why their licenses should not be suspended or revoked for activities in violation of the Act of 1965.

One of the most significant changes is in the amount of money derived from the making of a secondary mortgage loan. This bill makes a significant departure from the present law by disallowing the receipt of any fees or charges by a licensee in connection with a secondary mortgage loan, other than interest allowable pursuant to the terms of this legislation. Experience has shown that a large percentage of licensees have consistently been receiving the maximum allowable fees and charges under the Act of 1965, in addition to the interest permitted thereunder. The allowance of specified fees and charges provided a method whereby licensees were able to circumvent the policy and spirit of the legislation, since the combination of fees and charges plus interest amounted to an effective interest rate charge far in excess of that contemplated by the Legislature. On loans under $1,000.00, the fees and charges combined with the interest allowed may be equivalent to an effective interest rate in excess of 50%. In general, calculation of fees, charges and interest on loans of $2,000.00 or less establish that the total sum thereof paid by many borrowers is equivalent to an effective interest rate of 20 to 50%, depending upon the amount and term of the loan.

This bill corrects these abuses by establishing an interest rate which is commensurate with the risk involved in this type of loan and which takes into account the fact that no other fees and charges are permissible in connection therewith. The interest rate is established with a view toward assuring a reasonable profit to the licensee so that the money market in this area will not dry up. On the other hand, the rate is reasonable from the standpoint of the borrower involved. To assure that the rate continues to be adequate under the circumstances exist-

ing at any given time, the rate is made flexible to a maximum of 18% per year, by utilizing a procedure similar to that set forth in the amendment to the usury statute of 1968.